Supreme Court, U.S.
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No. 96-1263

In The

Supreme Court of the United States

October Term, 1996

OI-NEG TV PRODUCTS, INC.,

Petitioner,

vs.

CARMELA F. DURKO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below properly upheld the factual finding of the jury that the employer had actual and/or constructive notice that Ms. Durko was being sexually harassed?

2. Whether the courts below properly upheld the factual finding of the jury that the employer had an opportunity to demonstrate the effectiveness of its grievance procedure, and that such procedure was ineffective?

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STATEMENT OF THE CASE

A. Procedural History

This action was commenced by Complaint filed by Carmela F. Durko on August 17, 1993, setting forth a cause of action against OI-NEG TV Products, Inc., hereinafter "Employer," for discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), *et seq.*, as well as a claim of discrimination based on sex pursuant to the Pennsylvania Human Relations Act, 43 Pa. C.S.A. § 951, *et seq.* (App. 12-94).[1]

The Complaint further sets forth similar causes of action against Glass, Molders, Pottery, Plastics & Allied Workers International AFL-CIO, CLC No. 243, hereafter "Union" for discrimination in violation of Title VII and the PHRA. (*Id.*).

A jury trial commenced on September 20, 1994 and concluded on September 26, 1994. With respect to the Employer, the jury found that Ms. Durko proved by a preponderance of the evidence that she was subjected to hostile environment sexual harassment, and that the Employer was aware that she was being subjected to a sexually hostile work environment and failed to take appropriate corrective action (App. 132-135). The jury awarded compensatory damages from Employer in the amount of fifty thousand dollars ($50,000) (App. 133).

With respect to the Union, the jury found that Ms. Durko proved by a preponderance of the evidence that she was subjected to hostile environment sexual harassment and that the Union discriminatorily failed to pursue sexual harassment grievances on her behalf (App. 134). The jury awarded fifty

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1. "App." refers to the joint appendix filed with the Court of Appeals for the Third Circuit.

thousand dollars ($50,000) in compensatory damages and twenty five thousand dollars ($25,000) in punitive damages from the Union (App. 134-135). Judgment was entered by the District Court on September 28, 1994 (App. 423).

On or about October 12, 1994, both Employer and Union filed post-trial motions (App. 428-438). The motions of the Employer and Union were denied by the District Court by Memoranda and Orders dated December 29, 1995 and December 31, 1995 respectively (App. 1653-1691, 1672-1694).

The Employer filed its appeal to this Honorable Court on January 26, 1996 (App. 1695) with the Union filing its appeal on January 29, 1996 (App. 1696).

The Employer and Union filed appeals to the Third Circuit which were denied by Order dated November 12, 1996.

B. Factual Background

Carmela Durko became employed by Employer on or about March 31, 1986 (App. 15). At all relevant times, Ms. Durko was a member of Local 243 of the Glass, Molders, Pottery, Plastic & Allied Workers International Union AFL-CIO-CLC, hereinafter "Union" (App. 15).

The issues pertinent to the present Petitions arise from the jury's finding that Ms. Durko was subjected to hostile work environment sexual harassment of which the Employer was aware, and failed to take appropriate action, as well as the finding that the Union discriminatorily failed to pursue sexual harassment grievances on Ms. Durko's behalf (App. 132-135).

The jury found for the Employer and Union with respect to Ms. Durko's claim that she was removed by the Employer from

her position as Assistant Furnace Operator because of her sex, and that her gender was a determinative factor in the Union's decisions involving resolution of Ms. Durko's grievances relative to such removal. These verdicts in favor of the Employer and Union relative to Ms. Durko's claim of recall rights to the Assistant Furnace Operator's position have not been appealed and therefore are not before this Honorable Court.

The sexual harassment of Ms. Durko began in June of 1991 when she began working in the Batch and Furnace Department as an Assistant Furnace Operator (App. 16). Ms. Durko was initially given a tour by her foreman, Ron Walsh, during which Ms. Durko was made to crawl under the extremely hot furnace and go to the batch house to a height of approximately five stories (App. 541-545). The only protective equipment given to Ms. Durko to wear during this tour was a pair of paper coveralls, when the required safety equipment consisted of material coveralls and a respirator to prevent the inhalation of dangerous chemicals (App. 541-550).

Ms. Durko testified that from her observations of men being taken on similar tours, none were taken underneath the furnace (App. 675).

During the time Ms. Durko worked as an Assistant Furnace Operator, Mr. Walsh, her foreman and a member of management, would continually call Ms. Durko vile and disgusting names containing references to her gender, such as "dumb cunt" and "stupid bitch" (App. 564). Regarding the time it would take Ms. Durko to qualify as an Assistant Furnace Operator, Mr. Walsh stated that it would take her eighteen months to be qualified, and if she would be "nice to him", it would take her nine months (App. 563). Ms. Durko immediately made Mr. Walsh aware of her anger regarding such comment (App. 564).

On one of David Troutline's tours, Ms. Durko was requested to push a heavy charger to see if she could handle the job (App. 582). After Ms. Durko pushed the charger with all of her might, and she could not do it, Mr. Troutline stated "Well, that's part of your job duties. If you can't do that, well then you should turn down the job" (App. 616). During this incident, Mr. Troutline purposely neglected to tell Ms. Durko that the brake was on, with Ms. Durko only finding out that the brake was engaged when another worker approached her and took the brake off (App. 582).

Ms. Durko was also sexually harassed by Tom Wozniak, a Furnace Operator in the Batch and Furnace Department. During her initial five day trial period at the position of Assistant Furnace Operator, Mr. Wozniak would tell her that she "broke the barrier" by being the first woman as an Assistant Furnace Operator, kept taking her on tours of the "hot spots" of the department and repeatedly told her "You'll never do it. You'll never make it", as well as telling her "It's not a job for a woman" (App. 554-555).

While working with Ms. Durko, Mr. Wozniak would remark that she was "flat chested" approximately once a day for the eighteen month period Ms. Durko was in the Batch and Furnace Department (App. 573).

Approximately three months after she had begun the position in June of 1991, Mr. Wozniak began throwing hard cover books at her whenever he would get angry, striking her on one occasion (App. 570, 684).

Walter Snopeck, who was tasked with training Ms. Durko as an Assistant Furnace Operator, also called her crude names containing references to her gender, such as "dumb cunt" and "stupid bitch," plenty of times during the period of time she worked in the Batch and Furnace Department (App. 567-568).

Regarding the incidents of sexual harassment, Ms. Durko made reports to Union Stewards Randy Robbins, Mike Lieback, Joe Thomson, Gene Warnick, and Tom Yankey, as well as Union President Peter Moska and Union Business Agent Joseph Lutecki (App. 565-571, 574-585). Although certain Union Representatives filed grievances regarding Ms. Durko's recall rights, no Union Representative would submit a sexual harassment charge, despite repeated requests by Ms. Durko (App. 583).

Ms. Durko filed a Complaint with the Pennsylvania Human Relations Commission on August 4, 1992, containing, *inter alia* allegations of a sexually hostile work environment by both Employer and Union (App. 279).

Margaret Guffrovich, a witness for Employer, stated that such complaint was served on Employer as early as September, 1992 (App. 1439).

Further, at trial, it was stipulated *as fact* by the Employer and all other parties that the Employer had actual notice of Ms. Durko's complaints of sexual harassment by Mr. Walsh, a member of management. The stipulation of fact was as follows:

> Union President, Peter Moska, asked Margaret Guffrovich, from personnel, to investigate Ms. Durko's complaints of harassment against Mr. Walsh. After speaking with Mr. Walsh, Ms. Guffrovich reported back to Mr. Moska that there was no basis for Ms. Durko's complaints.

(App. 525).

Mr. Moska also confirmed the reports of sexual harassment to the Personnel Department (App. 1325-1335).

Mr. Walsh testified that he attended a meeting with Margaret Guffrovich and Mary Reynolds, another member of management, regarding the allegations of harassment, after which he did not hear back from either member of management and was not disciplined (App. 991-996).

On January 13, 1993, Ms. Durko was transferred to the Forming and Selecting Department because her temporary bid as Assistant Furnace Operator had expired (App. 588). Ms. Durko was subjected to being called a variety of vulgar names over the public address system, accompanied by loud moaning, with her name being loudly screamed (App. 593). It was Ms. Durko's unrebutted testimony that she told her foreman, Lenny Brown, about this (*id.*), as well as Union President Peter Moska. Further, Ms. Durko and Mr. Moska both reported the harassment to William Konopasek, Human Resource Supervisor, a member of management (*id.*) After meeting with Mr. Konopasek, speakers were allegedly put in his office, but Ms. Durko testified that the harassment continued until she left the Forming and Selecting Department (*id.*) At trial, Mr. Konopasek acknowledged that he did not investigate the matter, as Ms. Durko did not provide him information as to who was responsible for the noises (App. 906-909).

REASONS FOR DENYING THE WRIT

Standard for Granting Writ of Certiorari

The rules of this Court state that a Petition for Writ of Certiorari "will be granted only for compelling reasons." Sup. Ct. R. 10.

In general, the Supreme Court will not grant a Writ of Certiorari merely to review evidence or inferences drawn from it. *General Copy Pictures Corp. v. Western Electric Co.*, 304

U.S. 175, 82 L. Ed. 1273, 58 S. Ct. 849 (1938). Certiorari will also be denied if the case involves circumstances or issues which are not likely to be repeated, *see Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (noting that the Court reviews issues that are "beyond the academic or the mere episodic"); 13 James W. Moore, ed., *Moore's Federal Practice*, para. 810.21 at SC 10-23 (2d ed. 1995) (stating that the Court will not be inclined to review "an issue that is unlikely to recur" or "results from a unique factual situation"), or if "the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Moreover, certiorari will be granted "only in cases involving principles, the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority" between the Courts of Appeals. *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (*quoting Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923)).

Finally, the Court has refrained from resolving conflicts that arise between panels within the same circuit, on the grounds that such conflicts should be resolved by the Court of Appeals internally. *See, e.g., Taylor v. United States*, 493 U.S. 906 (1989); *Davis v. United States*, 417 U.S. 333, 340 (1974); *Wisniewski v. United States*, 353 U.S. 901, 902 (1957).

I.

THE COURTS BELOW PROPERLY UPHELD THE FACTUAL FINDING OF THE JURY THAT THE EMPLOYER HAD ACTUAL AND/OR CONSTRUCTIVE NOTICE THAT MS. DURKO WAS BEING SEXUALLY HARASSED.

The Employer's Petition for Writ of Certiorari with regard to the issue of whether the Employer had actual and/or constructive notice that Ms. Durko was being sexually harassed must be denied as Employer merely asserts that the court below misapplied a properly stated rule of law, or that erroneous factual findings were made by the jury.

Supreme Court Rule 10(c), states in pertinent part:

> A petition for Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Employer asserts that Ms. Durko failed to prove that management-level employees had actual or constructive notice about the existence of a sexually hostile work environment.

Regarding the merits of the Employer's claim, the testimony at trial, as well as the Employer's own Stipulation of Fact, clearly establishes both actual and constructive notice to the Employer of the sexual harassment Ms. Durko was enduring.

Agency principles are employed when deciding employer liability for sexually hostile work environments. *Bouton v. BMW of North America,* 29 F.3d 103, 106 (3rd Cir. 1994), *citing*

Meritor Savings Bank, F.S.B., 477 U.S. at 72. Three potential bases for holding employers liable for sexual harassment perpetrated by their employees under § 219 of the Restatement (Second) of the Agency are as follows: (1) torts committed by employees within the scope of their employment; (2) an employer's negligent failure to discipline or fire, or failure to take remedial action upon notice of harassment; and (3) actions taken by employees in reliance upon apparent authority or if they were aided by their agency relationship. *Bouton*, 29 F.3d at 106.

The above agency principles direct that liability exists where the defendant knew or should have known of the harassment and failed to take prompt remedial action. *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1486 (3rd Cir. 1990). Thus, if the evidence permits an inference that management level employees had actual or constructive knowledge about the existence of a sexually hostile environment and failed to take prompt and adequate remedial action, the employer's post-trial motions must be denied. *See Andrews, supra*; *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983).

Employer then goes on to quote a very narrow passage of Ms. Durko's testimony which indicates that although Ms. Durko made complaints of sexual harassment to Union Stewards Thomson and Warnick, as well as Union Business Agent Joseph Lutecki and Union President Peter Moska, that she never made such complaints directly to management (Employer's Petition 7-11). Such citation ignores vast amounts of testimony indicating that the Employer had actual notice, some of which was from the Employer's own witnesses. Also ignored is the Employer's stipulation to the fact of actual notice which was presented to the jury (App. 525).

Obviously, the cited passage of Ms. Durko's testimony deals

with *actual notice* of the sexual harassment to the Employer and does not deal with the constructive notice provided due to the pervasiveness of such contact.

Regarding actual notice, management personnel were indeed aware that Ms. Durko was being sexually harassed, as Ron Walsh, her foreman, was actually performing the harassment through his plant tours given to Ms. Durko without providing her with the required safety equipment, as well as his gender-specific name-calling performed on a regular basis from June of 1991 until Ms. Durko left the department in January of 1993 (App. 564). Also, as stated previously, Ms. Durko directly complained to Mr. Walsh about his comment about the length of time it would take her to be qualified as an Assistant Furnace Operator if "she was nice" to him (App. 564). Further, Employer acknowledges receiving a PHRC Complaint on September 30, 1992, regarding the sexual harassment allegations (App. 1439). Further, the Employer stipulated to the *fact* of having actual notice of Ms. Durko's complaints of sexual harassment as follows:

> Union President, Peter Moska, asked Margaret Guffrovich, from personnel, to investigate Ms. Durko's complaints of harassment against Mr. Walsh. After speaking with Mr. Walsh, Ms. Guffrovich reported back to Mr. Moska that there was no basis for Ms. Durko's complaints.

(App. 525).

The Employer's own witness, Margaret Guffrovich, Assistant Human Resource Supervisor, admitted that she was aware of Ms. Durko's allegations of sexual harassment through Ms. Durko's complaint to the PHRC as well as through a meeting

with Union President Peter Moska, and further admits that an investigation subsequently ensued (App. 1439). Ms. Durko also provided unrebutted testimony that she reported the sexual harassment occurring over the loudspeaker to her foreman, Lenny Brown, and William Konopasek, the Human Resource Manager, both members of management (App. 594). Ms. Durko's complaints of sexual harassment were also reiterated in her Amended PHRC Complaint served on management in February of 1993 (App. 705). Again, the company stipulated *to the fact* of actual notice at trial (App. 525).

In the present case, no prompt and effective remedial action was taken by the Employer as no employee was disciplined for such harassment, and the harassment by Mr. Walsh, Mr. Snopeck, and Mr. Wozniak continued on a regular basis from June of 1991 until January of 1993, a period after the actual notice provided by the PHRC Complaint (App. 574). Further, the harassment occurring over the loudspeaker, which began when Ms. Durko was transferred to the Forming and Selecting Department in January of 1993, continued even after Ms. Durko's meeting with William Konopasek (App. 594) who further admitted that he did not investigate Ms. Durko's complaints (App. 905-909).

Even after directly notifying Mr. Konopasek and Ms. Guffrovich, Ms. Durko testified that there was never a time when the sexual harassment diminished and that the harassment actually got worse after the meeting with Mr. Konopasek (App. 696-699).

In addition to the actual knowledge of the harassment as indicated above, the Employer also had constructive knowledge of the harassment through its pervasiveness. *See Henson v. Dundee,* 682 F.2d 897, 905 (11th Cir. 1982). In fact, the jury was instructed, without objection, that the Respondent can demonstrate that the Employer knew of the harassment by

showing the pervasiveness of such harassment (Docket Entry 67). The jury subsequently found in Ms. Durko's favor.

Based on the above discussion, it is asserted that the Employer had actual notice of the allegations of sexual harassment on repeated occasions as well as constructive notice through the pervasiveness of such harassment carried out by numerous employees, including members of management.

II.

THE EVIDENCE AT TRIAL DID NOT ESTABLISH THAT THE EMPLOYER HAD AN EFFECTIVE GRIEVANCE PROCEDURE, THAT SUCH PROCEDURE WAS KNOWN TO MS. DURKO, AND THAT MS. DURKO FAILED TO AVAIL HERSELF OF THAT GRIEVANCE PROCEDURE.

Employer's Petition for Writ of Certiorari regarding the existence of a grievance procedure and Ms. Durko's alleged failure to use such procedure, should be denied as a mere allegation of error with regard to a factual finding, or a misapplication of the properly stated rule of law. Sup. Ct. R. 10.

Regarding the merits of the Employer's claim, Employer asserts that the evidence at trial established that OI-NEG had an effective grievance procedure, that it was known to Ms. Durko and that she failed to avail herself of that procedure, thereby absolving it from liability for hostile environment sexual harassment.

Employer cites *Bouton v. BMW of North America, Inc.*, 29 F.3d 103 (3rd Cir. 1994) in which the Third Circuit held that the existence of an effective grievance procedure known to the victim and that timely stops the harassment, shields the

Employer from Title VII liability for a hostile environment. *Id.* at 110. A review of the record indicates that none of the above elements are satisfied.

There exists evidence of record that Employer had a grievance procedure in effect (App. 624, 806-807, 909-912, 1440-1442). However, Ms. Durko stated that she did not read any such policy until after the fact (App. 624). However, even assuming Ms. Durko knew about the sexual harassment policy in effect, the record shows that Ms. Durko did report incidents of sexual harassment to the proper management personnel. This is contrary to Employer's assertion that Ms. Durko never apprised OI-NEG management that she was being sexually harassed.

Although Employer cites a very narrow passage of Ms. Durko's testimony, which, ignoring all other testimony in the case, tends to indicate that Ms. Durko did not report being sexually harassed to management, there was a multitude of testimony, including that of Employer's own witnesses that indicates that Ms. Durko, either herself or through a Union Representative did make management aware of such complaints.

Ms. Durko testified that she was subjected to being called a variety of vulgar names over the public address system, accompanied by loud moaning with her name being loudly screamed (App. 594). It was Ms. Durko's unrebutted testimony that she told her foreman, Lenny Brown, about this, as well as Union President Peter Moska (*id.*). Further, Ms. Durko and Mr. Moska both reported the harassment to William Konopasek, Human Resource Supervisor, a member of management (*id.*). After meeting with Mr. Konopasek, speakers were allegedly put in his office, but Ms. Durko testified that the harassment continued until after she left the Forming and Selecting Department (*id.*).

Mr. Konopasek acknowledged in his testimony that a meeting between himself, Ms. Durko, and Mr. Moska occurred, but stated that Ms. Durko allegedly did not inform him that the complaints were directed toward her. Mr. Konopasek further acknowledged that he did not investigate the matter, as Ms. Durko did not provide him information as to specifically who was responsible for the noises (App. 906-909).

Further, it was stipulated as fact between counsel and agreed by all parties that Union President Peter Moska asked Margaret Guffrovich, the Assistant Human Resource Manager, to investigate Ms. Durko's complaints of sexual harassment against Mr. Walsh, consisting of him repeatedly calling her crude and degrading names. After speaking with Mr. Walsh, Ms. Guffrovich reported back to Mr. Moska that there was no basis for Ms. Durko's complaints (App. 525). Such stipulation was also corroborated by the testimony of Peter Moska and Margaret Guffrovich (App. 1057-1058, 1325-1335).

Further, management of OI-NEG acknowledged that the company was in receipt of a complaint alleging sexual harassment against the Employer, filed by Ms. Durko with the Pennsylvania Human Relations Commission, served on the company as early as September of 1992 (App. 1439). Margaret Guffrovich testified that an investigation regarding the sexual harassment did ensue, consisting of her asking different managers if they had any information regarding the harassment (App. 1439). Mr. Walsh testified that he attended a meeting with Margaret Guffrovich and Mary Reynolds, another member of management, regarding the sexual harassment, and after such a meeting did not hear back from either member of management (App. 991-996). There is no evidence of record that anyone ever received any discipline because of Ms. Durko's allegations.

From the above discussion, the Employer's "grievance

procedure" was put into effect on at least two occasions, one dealing with the report of sexual harassment by Ronald Walsh to Margaret Guffrovich, and the other occasion being the report of sexual harassment over the intercom system to Mr. Konopasek. When Ms. Durko provided the name of her harasser, Ronald Walsh, to Ms. Guffrovich, the "grievance procedure" consisted of Ms. Guffrovich asking the harasser whether he committed the harassment, followed by his denial of such harassment, thus concluding the "grievance procedure". When Ms. Durko could not provide the name of her harasser via the intercom system, Mr. Konopasek decided that no further investigation was necessary. Such grievance procedure can hardly be labelled as "effective".

As stated earlier, a grievance procedure which is effective, *i.e.* one that is known to the victim and *timely stops the harassment,* shields the employer from Title VII liability for a hostile environment. *Bouton, supra*, at 110 (emphasis added). Ms. Durko testified that even after she made the complaints as enumerated above, such harassment continued (App. 594, 614, 642-645).

It is also important to note that the Employer did not present any evidence, such as statistical data, to substantiate its assertion that the grievance procedure was effective. The mere existence of a grievance process does not insulate an employer from liability under Title VII. *See Meritor Savings Bank, F.S.B. v. Vinson,* 477 U.S. 57, 72 (1986).

Thus, although management knew of Ms. Durko's sexual harassment complaints, whatever grievance procedure put in effect was obviously ineffective, thereby subjecting the Employer to liability for a hostile work environment based on sexual harassment.

CONCLUSION

For the foregoing reasons, the Petition of the Employer for a Writ of Certiorari should be denied.

Respectfully submitted,

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